

STATE OF MICHIGAN
IN THE SUPREME COURT

LANAH HARRIS, Next Friend of
Mariah Bogard-Deitz,
William Wesley Deitz, and
Donald Harris, Jr., minors,

Plaintiff-Appellee,

v

PAUL RAHMAN,
WALTER SAKOWSKI,
Personal Representative of the
Estate of Richard E. Rahman, Deceased,
COUNTY OF WAYNE,
BAKER DENTAL DIVISION,
ENGLEHARD INDUSTRIES, INC.,
TROY CHEMICAL COMPANY,

Defendants,

and

HENRY MACIEJEWSKI,

Defendant-Appellant.

Supreme Court
No:

Court of Appeals
No: 247253

Wayne County Circuit Court
No: 01-116038 NO

J. Rashid

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HENRY MACIEJEWSKI'S APPLICATION FOR LEAVE TO APPEAL

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ORDERS APPEALED AND RELIEF SOUGHT

Henry Maciejewski appeals the following orders:

1. Court of Appeals order dated July 22, 2004, denying Mr. Maciejewski summary disposition based on individual immunity (Appendix A).
2. Wayne County Circuit Court order dated February 19, 2003, denying Mr. Maciejewski's motion for summary disposition based on individual immunity (Appendix B).

Mr. Maciejewski requests this court:

1. In lieu of granting leave to appeal, reverse the lower courts and grant Mr. Maciejewski summary disposition (MCR 7.302(G)(1)); or, in the alternative,
2. Grant leave to appeal and grant Mr. Maciejewski summary disposition following full briefing; or, in the alternative,
3. Remand this case to the Court of Appeals for re-briefing and re-hearing and order that the Court of Appeals shall consider Maiden, Skinner, Robinson, and Haliw.

QUESTIONS PRESENTED FOR REVIEW

- I This court has held that plaintiff bears the burden of establishing the elements of a traditional negligence claim even when the defendant claims governmental immunity. In the case before the court today, both the trial court and Court of Appeals held it was the governmental employee's burden to prove that he was not the proximate cause of plaintiff's injuries. Where plaintiff did not come forward with facts establishing that defendant was the proximate cause of plaintiff's injuries at the summary disposition stage, is defendant entitled to summary disposition?

Plaintiff answered: No.

The trial court answered: No.

The Court of Appeals answered: No.

Mr. Maciejewski answers: Yes.

- II This court has held that plaintiff bears the burden to come forward with specific facts to support her claim that a governmental employee's conduct was grossly negligent. In the case before the court today, both the trial court and Court of Appeals held it was the governmental employee's burden to prove that he was not grossly negligent. Where the plaintiff did not come forward with specific facts at the summary disposition stage to support her claim of gross negligence, is the governmental employee entitled to summary disposition?

Plaintiff answered: No.

The trial court answered: No.

The Court of Appeals answered: No.

Mr. Maciejewski answers: Yes.

- III Where both the trial court and Court of Appeals made errors of law and material fact, is defendant entitled to have those errors corrected now?

Mr. Maciejewski answers: Yes.

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STATEMENT OF MATERIAL FACTS

The relevant facts of this case are undisputed and/or uncontradicted.

In the 1950s or 1960s, Richard Rahman obtained a one pound container of dental mercury.¹ He stored this mercury in his home at 23232 Columbia, Dearborn, until his death in 1998.²

Richard Rahman's son, Paul, became the personal representative of the estate.³

Paul Rahman rented the Columbia Street house to Lanah Harris and her family with all the furniture, appliances and personal belongings of Richard Rahman still in the house.⁴

On May 31, 1998, Lanah Harris and her family moved into the house.⁵ Ms. Harris began cleaning out Mr. Rahman's belongings in June.⁶

¹Second Amended Complaint, ¶ 18. (Attached as Appendix C).

²Appendix C, ¶ 19.

³Appendix C, ¶ 20.

⁴Appendix C, ¶¶ 25, 27.

⁵Harris dep, p 142, lines 22-23.

⁶Harris dep, p 182, lines 15-24.

On or about June 29 or June 30, 1998,⁷ Ms. Harris' 15-year old daughter,⁸ Mariah Deitz, found the bottle of dental mercury⁹ in the upstairs medicine cabinet of the house.¹⁰

Mariah took the cap off and poured the mercury into the palm of her hand.¹¹ It slid through her fingers and down the sink drain.¹² She walked downstairs, sat on a chair or couch and poured more mercury into her hand.¹³ The mercury landed on the floor in front of the chair or couch.¹⁴ She then went through the kitchen¹⁵ to the basement¹⁶ to show the mercury to her step brother, Don Jr.¹⁷ He was sleeping,¹⁸ so

⁷Deitz dep, p 55, lines 14-15. Harris dep, p 160, lines 16-19. Appendix D.

⁸Deitz dep, p 21, lines 11-12.

⁹Deitz dep, p 28, lines 3-4; p 27, lines 22-23.

¹⁰Deitz dep, p 27, lines 8-10.

¹¹Deitz dep, p 28, lines 14-24.

¹²Deitz dep, p 29, lines 22-23; p 30, lines 2-7.

¹³Deitz dep, pp 33-34.

¹⁴Deitz dep, p 34, lines 9-12.

¹⁵Deitz dep, p 36, line 7.

¹⁶Deitz dep, p 37, line 2.

¹⁷Deitz dep, p 37, lines 9-11.

¹⁸Deitz dep, p 37, line 22.

Mariah poured the mercury on his chest and watched it roll off.¹⁹ He woke up²⁰ and more mercury rolled off and onto the bed.²¹

Next Mariah poured the mercury on her bellybutton.²² She stood up and it came out.²³

Next Mariah dipped a cigarette in the bottle of mercury²⁴ and smoked it²⁵ until it was finished.²⁶

Mariah poured the rest of the mercury down the toilet.²⁷

A day or two later,²⁸ Lanah Harris found the empty bottle of mercury and asked Mariah where she had gotten the bottle.²⁹

The next thing Mariah remembers is her mom talking to Paul Rahman.³⁰ Mariah

¹⁹Deitz dep, p 39, lines 11-16.

²⁰Deitz dep, p 40, lines 6-7.

²¹Deitz dep, p 40, lines 8-9.

²²Deitz dep, p 40, line 21.

²³Deitz dep, p 41, line 9.

²⁴Deitz dep, p 42, line 4.

²⁵Deitz dep, p 43, lines 10, 11.

²⁶Deitz dep, p 49, lines 21-23.

²⁷Deitz dep, p 54, lines 18-19.

²⁸Deitz dep, p 55, lines 10-16.

²⁹Deitz dep, p 55, lines 10-16.

³⁰Deitz dep, p 57, lines 3-4.

remembers her mom saying that "Paul said that we should get down on our hands and knees and pick it up with playing cards and vacuum it up and we shouldn't call nobody."³¹

Mariah testified she thinks they "actually did get down on the floor and pick it up with cards and stuff, or tried to at least."³²

Lanah Harris remembers that she contacted Paul Rahman a few days after July 4th.³³ And that "he told me I should make my kids go down there and clean it up. He was mad. He was yelling almost into the phone at me."³⁴

Lanah Harris testified that the first thing she did was call Children's Hospital Poison Control.³⁵

She testified "they wanted me to read off the bottle what it said. . . . They explained to me from what I read to them off the bottle what mercury was and that it could be harmful."³⁶

And "that until somebody got with us that we should leave the house."³⁷

Ms. Harris testified that she, her children, her husband, 23 ferrets and three

³¹Deitz dep, p 57, lines 24-25; p 58, lines 1-2.

³²Deitz dep, p 58, lines 20-22.

³³Harris dep, p 178, lines 8-18.

³⁴Harris dep, p 180, lines 5-10.

³⁵Harris dep, p 160, lines 16-19.

³⁶Harris dep, p 162, lines 8-14.

³⁷Harris dep, p 162, lines 16-17.

dogs stayed outside all day.³⁸

She testified "I sat out there waiting for somebody to call back. Paul never called back. Mr. Hank [Maciejewski] I couldn't get a hold of him right away. Poison Control didn't call back that day. It was well dark time and we were still sitting in the yard."³⁹

Ms. Harris continued, "the house wasn't burning, it wasn't smoking, it wasn't smelling. I started to wonder if there was really a problem. . . . We went back in the house."⁴⁰

Poison Control records indicate that they called Ms. Harris the next day, July 2.⁴¹ It records that Ms. Harris called the Wayne County Health Department, that "they will come out and measure mercury levels Tue, 7/7. Her family friend who runs an environmental company cleaned up with closed vacuum system to basement and pipes. Believes that all mercury has been removed. Stressed importance of having follow-up air levels done. Also suggested that kids who handled the mercury should get blood mercury level done."⁴²

Henry Maciejewski (referred to as Mr. Hank throughout the deposition

³⁸Harris dep, p 162, lines 23; p 163, lines 1-2.

³⁹Harris dep, p 163, lines 8-13.

⁴⁰Harris dep, p 163, lines 15-20.

⁴¹Children's Hospital Poison Control computer printout attached as Appendix D.

⁴²Appendix D.

transcripts) is an employee of the Wayne County Health Department.⁴³ Mr. Maciejewski testified that Ms. Harris called him at the Health Department on July 2, 1998.⁴⁴

Mr. Maciejewski denies telling Ms. Harris the date when he would measure the mercury levels.⁴⁵

He recalls that "basically the call concerned that her children had found some mercury in the house that she was residing in, that they had spilled . . . the mercury. That was basically her statement to me at the time. . . . I do not believe that amounts were talked about at that time."⁴⁶

He was then asked "did she indicate to you how much mercury was involved?"

He answered "no."⁴⁷

He was asked "does the amount of mercury make a difference in terms of toxic exposure?"

He answered, "yes."⁴⁸

Mr. Maciejewski was asked what he told Ms. Harris during the telephone conversation.

⁴³Maciejewski dep, p 3.

⁴⁴Maciejewski dep, p 19, lines 20-24; p 20, line 1.

⁴⁵Maciejewski dep, p 24, lines 15-19.

⁴⁶Maciejewski dep, p 20, lines 12-16.

⁴⁷Maciejewski dep, p 20, lines 21-23.

⁴⁸Maciejewski dep, p 20, lines 24-25; p 21, line 1.

He answered "basically that we do not have the equipment to perform this type of an investigation, that I requested that she contact a consulting firm, an environmental consulting firm, that, in fact, they would have the equipment on hand and would be much better, you know, much better off performing the investigation than we would."⁴⁹ He testified he gave her the name of a consulting firm to contact.⁵⁰

On July 7, Children's Hospital Poison Control called Ms. Harris and the house had not been tested yet.⁵¹

On July 13, Poison Control called Ms. Harris and "she is unclear who to call for home testing and where to go for lab testing . . . advised that she needs to be specific in getting the testing done."⁵²

Mr. Maciejewski testified that, on approximately that date, Ms. Harris recontacted him and he testified "I once again explained to her . . . I was going to have to borrow the equipment and that--and we told her that as soon as I could get my hands on the meter and be sure that it was . . . fully charged . . . I was not very positive about being able to do this . . . I always try and explain to people exactly why I keep on stressing the need for an environmental . . . consulting firm."⁵³

On July 20--nearly three weeks after Ms. Harris discovered the spill--Children's

⁴⁹Maciejewski dep, p 21, lines 10-16.

⁵⁰Maciejewski dep, p 21, lines 21-23; p 23, lines 6-8.

⁵¹Appendix D.

⁵²Appendix D.

⁵³Maciejewski dep, pp 26-27.

Hospital Poison Control notes record "blood work done--results on Wednesday air level to be checked on Tuesday."⁵⁴

Mr. Maciejewski testified there are only two U.S. Environmental Protection Agency meters for this area of the country and both were in use in Southern Ohio because of flooding.⁵⁵

Mr. Maciejewski borrowed a meter from Wayne State University, but the battery was dead.⁵⁶

On Wednesday, July 22, Henry Maciejewski tested the Harris house for mercury.⁵⁷ But, he testified, "I had absolutely no confidence in the meter . . . from the way the meter was acting . . . I knew I was sampling mercury . . . [but] no way of knowing what levels of mercury I was actually sampling."⁵⁸

He testified that the readings he was obtaining "were within industrial standards as being safe."⁵⁹

The next day, Dr. White (at Children's Hospital) contacted Mr. Maciejewski with the mercury levels for the children.⁶⁰

⁵⁴Appendix D.

⁵⁵Maciejewski dep, p 32, lines 23-25.

⁵⁶Maciejewski dep, p 31, lines 7-14.

⁵⁷Maciejewski dep, p 91, lines 12.

⁵⁸Maciejewski dep, p 33, lines 20-24.

⁵⁹Maciejewski dep, p 80, line 25; p 81, line 1.

⁶⁰Maciejewski dep, p 30, lines 2-8.

Mr. Maciejewski testified that the readings were so high they were "scary."⁶¹ He testified that he contacted the state health department, the City of Dearborn and the EPA.⁶² Mr. Maciejewski recommended the EPA get involved in the Columbia Street clean up,⁶³ although the EPA very seldom does residential toxic clean up.

Mr. Maciejewski testified that "Dearborn red tagged the house almost immediately after I contacted them."⁶⁴

Ms. Harris confirms that the City of Dearborn came to her house after Mr. Maciejewski was there.⁶⁵ And that the family moved out of the house the day after Mr. Maciejewski was there.⁶⁶

STATEMENT OF MATERIAL PROCEEDINGS

Ms. Harris filed a complaint and two amended complaints naming eight defendants, including Wayne County and Mr. Maciejewski.⁶⁷

Wayne County was granted summary disposition based on governmental

⁶¹Maciejewski dep, p 41, lines 6-8.

⁶²Maciejewski dep, p 43, lines 8-10; p 125, lines 17-22.

⁶³Maciejewski dep, p 105, lines 15-16; p 106, lines 16-25.

⁶⁴Maciejewski dep, p 114, lines 10-11.

⁶⁵Harris dep, p 186, lines 8-10.

⁶⁶Harris dep, p 166, lines 10-11.

⁶⁷Second Amended Complaint attached as Appendix C.

immunity and is not part of this appeal.⁶⁸

As to Mr. Maciejewski, Ms. Harris alleged he was grossly negligent for failing to instruct the Harris family to immediately vacate the premises.⁶⁹

Mr. Maciejewski filed a motion for summary disposition under MCR 2.116(C)(7), (8) and (10) based on individual immunity granted by statute⁷⁰ and specifically argued that his conduct did not amount to gross negligence⁷¹ nor was he the proximate cause of plaintiff's injuries.⁷²

The trial court ruled that it was defendant's burden to demonstrate that he was not grossly negligent and not the proximate cause of plaintiff's injuries.⁷³

The court said "I don't know at this stage whether prolonged exposure causes more damage than first contact with mercury."⁷⁴

And "I don't know the answer to . . . causation without additional documentation . . ."⁷⁵

Mr. Maciejewski filed an appeal as of right to the Court of Appeals. The Court

⁶⁸Appendix B.

⁶⁹Appendix C, ¶ 58 a.

⁷⁰MCL 691.1407(2).

⁷¹Motion transcript, p 23, lines 2-8.

⁷²Motion transcript, p 14, lines 17-21.

⁷³Motion transcript, p 10, lines 5-10.

⁷⁴Motion transcript, p 21, lines 9-11.

⁷⁵Motion transcript, p 32, lines 23-25.

of Appeals held that “the trial court correctly determined that a genuine issue of material fact exists as to whether defendant was grossly negligent in connection with the injuries suffered by plaintiff’s children” and “that defendant . . . failed to meet his burden in demonstrating that no genuine issue of material fact exists as to the element of proximate cause.”⁷⁶

Mr. Maciejewski files this application for leave arguing that the trial court’s order and the Court of Appeals opinion are based on errors of material fact and conflict with at least four decisions of this court and the court rules.⁷⁷

⁷⁶Court of Appeals slip opinion at p 4. Attached as Appendix A.

⁷⁷Robinson v City of Detroit, 462 Mich 439; 613 NW2d 307 (2000). Skinner v Square D Co, 445 Mich 153; 516 NW2d 475 (1994). Maiden v Rozwood, 461 Mich 109; 597 NW2d 817 (1999). Nawrocki v Macomb Co Rd Comm’n, 463 Mich 143; 615 NW2d 702 (2000). MCR 2.116(G)(4).

ARGUMENT

I

MR. MACIEJEWSKI IS ENTITLED TO PREVAIL ON APPEAL BECAUSE PLAINTIFF DID NOT ESTABLISH BY ADMISSIBLE EVIDENCE THAT MR. MACIEJEWSKI WAS THE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES

By statute, governmental employees are immune from tort liability unless their gross negligence "is the proximate cause of the injury."⁷⁸ This court has held that "the phrase 'the proximate cause' contemplates *one* cause."⁷⁹

This court went on to define proximate cause as "the one most immediate, efficient, and direct cause of the injury."⁸⁰

In the case before the court today, Mr. Maciejewski argued in his motion for summary disposition that his failure to tell the Harris family to leave the house was not the proximate cause of plaintiff's injuries.⁸¹

⁷⁸MCL 691.1407(2)(c).

⁷⁹Robinson, supra at 462. Emphasis in the original.

⁸⁰Id.

⁸¹Motion transcript, p 14.

In the trial court, Mr. Maciejewski presented deposition testimony that he did not:

1. Leave the bottle of mercury in the Columbia Street house;
2. Open the bottle and pour it on the bodies of Mariah and Don Jr.;
3. Carry and spill the mercury throughout the house;
4. Put a cigarette in the mercury and have the children smoke it;

5. Nor did he tell Ms. Harris to reenter the home after Poison Control told her to leave the house. In fact, Ms. Harris had not even contacted Mr. Maciejewski when she made the decision to move the family back into the house.⁸²

Indeed, Ms. Harris' own deposition testimony established that it was she who made the decision to move the family back into the house because "the house wasn't burning, it wasn't smoking, it wasn't smelling. Started to wonder if there was really a problem. . . . We went back in the house."⁸³

Ms. Harris also testified that she tried to pick up the mercury with playing cards.⁸⁴

The uncontradicted deposition testimony established at the summary disposition stage that all these events happened before Ms. Harris even contacted Mr. Maciejewski.⁸⁵

⁸²Harris dep, p 163, lines 8-20.

⁸³Harris dep, p 163, lines 15-20.

⁸⁴Harris dep, p 166, lines 21-24; p 167, lines 1-3.

⁸⁵Harris dep, p 163, lines 9-20.

The court rules⁸⁶ and this court's holdings provide that when faced with a motion for summary disposition under MCR 2.116(C)(10) (which the trial court said it was deciding this motion under) "an adverse party . . . must . . . set forth specific facts showing that there is a genuine issue for trial. . . . The court rule plainly requires the adverse party to set forth specific facts at the time of the motion." And the court may only consider the "admissible evidence actually proffered in opposition to the motion."⁸⁷

Not only do the court rules and this court's holding in Maiden put the burden on plaintiff to establish proximate cause, but other rulings of this court do as well. For example:

1. "After successfully pleading in avoidance of governmental immunity, a plaintiff still must prove a cause of action under traditional negligence principles"⁸⁸ and
2. "Where a plaintiff successfully pleads in avoidance of governmental immunity . . . the plaintiff must still prove, consistent with traditional negligence principles the remaining elements of breach, causation and damages . . ."⁸⁹

In the case before the court today, the trial court impermissibly shifted the burden to Mr. Maciejewski saying: "The burden is on you as the moving party to

⁸⁶MCR 2.116(G)(4).

⁸⁷Maiden, *supra* at 120-121.

⁸⁸Nawrocki, *supra* at 172 n 29.

⁸⁹Haliw v City of Sterling Heights, 464 Mich 297, 304; 627 NW2d 581 (2001).

establish there is no genuine issue of fact that the most immediate efficient and direct cause of any injury to the plaintiff is not any conduct attributable to your client.”⁹⁰

The trial court was incorrect.

Once Mr. Maciejewski put forth the admissible deposition testimony that he neither brought the mercury into the house nor spilled the mercury throughout the house, it was plaintiff’s burden to present admissible evidence that Mr. Maciejewski’s conduct was “the one most immediate, efficient, and direct cause of the injury.”⁹¹

Under both the court rules and this court’s decisions, the plaintiff bears the burden of establishing the elements of a tort claim, including proximate cause.⁹² And this remains true when the defendant claims governmental immunity.⁹³

The improper allocation of the burden of proof was important at the trial court level because the trial court admitted “I don’t know at this stage whether prolonged exposure causes more damage then first contact with mercury.”⁹⁴

And “I don’t know the answer to . . . causation without additional documentation . . .”⁹⁵

Since, under Maiden, the plaintiff was required to set forth specific, admissible

⁹⁰Motion transcript, p 10, lines 6-10.

⁹¹Robinson, supra at 462. Haliw, supra at 304.

⁹²Skinner, supra.

⁹³Nawrocki, supra. Haliw, supra. Maiden, supra.

⁹⁴Motion transcript, p 21, lines 9-11.

⁹⁵Motion transcript, p 32, lines 23-25.

facts at the motion stage demonstrating a genuine issue of fact for trial,⁹⁶ Mr. Maciejewski was entitled to summary disposition when the court determined that “I don’t know the answer to . . . causation without additional documentation . . .”

The error was compounded--not corrected--by the Court of Appeals when the court held “we find that the trial court also correctly determined that defendant had failed to meet his burden in demonstrating that no genuine issue of material fact exists as to the element of proximate cause. Because defendant did not make the required showing, we find, upon review de novo, that he failed to demonstrate that no genuine issue of material fact exists as to the element of proximate cause.”⁹⁷

However, Mr. Maciejewski presented uncontradicted deposition testimony that he did not leave the bottle of mercury in the Columbia Street house, did not open the bottle and pour it on the bodies of the children, did not carry and spill the mercury throughout the house, did not put a cigarette in the mercury and have the children smoke it, and did not make the decision for the family to reenter the house contrary to the explicit direction of Poison Control. At that stage in the proceedings--after defendant had specifically identified the basis for his argument that he was not the proximate cause of plaintiff’s injuries at the summary disposition stage--it was then plaintiff’s burden to establish that Mr. Maciejewski was the one, most immediate,

⁹⁶Maiden, supra at 120-121.

⁹⁷Harris, slip opinion at 4 (Appendix A).

efficient, and direct cause⁹⁸ of plaintiff's injuries.

The record demonstrates that plaintiff did not establish that Mr. Maciejewski was the proximate cause of plaintiff's injuries at the summary disposition stage because the trial court admitted on the record "I don't know the answer to . . . causation without additional documentation."⁹⁹

A de novo review of the facts and law, therefore, entitles Mr. Maciejewski to summary disposition.

⁹⁸Robinson, supra at 462.

⁹⁹Motion transcript, p 32, lines 23-25.

II

MR. MACIEJEWSKI IS ENTITLED TO PREVAIL ON APPEAL BECAUSE PLAINTIFF DID NOT ESTABLISH BY ADMISSIBLE EVIDENCE THAT MR. MACIEJEWSKI WAS GROSSLY NEGLIGENT

Under the governmental immunity statute, public employees are immune from liability for conduct that does not amount to “gross negligence.”¹⁰⁰

Evidence of ordinary negligence does not create a question of fact regarding gross negligence.¹⁰¹

Gross negligence means “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.”¹⁰²

This court long ago held: “One who is properly charged with recklessness . . . is not simply more careless than one who is guilty of negligence. His conduct must be such as to put him in the class with the willful doer of wrong.”¹⁰³

In the case before the court today, the Court of Appeals said “plaintiff presented

¹⁰⁰MCL 691.1407(2)(c).

¹⁰¹Maiden, *supra* at 122-123.

¹⁰²Id.

¹⁰³Gibbard v Curson, 225 Mich 311, 321; 196 NW 398 (1923).

evidence that . . . defendant was informed during his first conversation with Lanah Harris that one pound of mercury was involved and that the Poison Control Center had advised the family to evacuate the home . . . [and] not only did defendant not advise the Harris family to evacuate the home, but he directly contradicted the advice given the family by the Poison Control Center in telling them that it was mere speculation that the levels of mercury in the home were dangerous.”¹⁰⁴

The Court of Appeals is incorrect and has juxtaposed documents from unrelated witnesses and taken statements out of context and has distorted the testimony and truth.

There is no deposition testimony--nor any other admissible evidence of any kind--from either Lanah Harris or Henry Maciejewski that Ms. Harris informed Mr. Maciejewski during the first conversation, or indeed at any other time, that one pound of mercury was involved.

Ms. Harris describes the first contact with Mr. Maciejewski in her deposition: “I don’t know what day it was, but I got a hold of Mr. Hank and he said that he needed to see about getting a meter. And he explained to me what the meter would do, because first you have to decide if there is a problem and the meter would measure if there’s a problem. And he said he had to borrow one, Wayne County didn’t have one. So he had a difficult time getting a hold of that.”¹⁰⁵

¹⁰⁴Harris, supra at p 4 (Appendix A).

¹⁰⁵Harris dep, p 163, lines 23-24; p 164, lines 1-7.

Mr. Maciejewski described the first conversation with Ms. Harris: "Basically the call concerned that her children had found some mercury in the house that she was residing in, that they had spilled the--that they had spilled the mercury. That was basically her statement to me at the time. . . . I do not believe the amounts were talked about at this time I do not remember that at all."¹⁰⁶

Mr. Maciejewski was then asked "did she indicate to you how much mercury was involved?" He answered "no." He was then asked, "does the amount of mercury make a difference in terms of toxic exposure?"

He answered, "yes . . ."¹⁰⁷

Mr. Maciejewski was asked "what did you tell Ms. Harris during this telephone conversation?"

Mr. Maciejewski answered "basically that we do not have the equipment to perform this type of an investigation, that I requested that she contact a consulting firm, an environmental consulting firm, that, in fact, they would have the equipment on hand and would be much better, you know, much better off performing the investigation then we would."¹⁰⁸

The record demonstrates that both Ms. Harris and Mr. Maciejewski have essentially the same recollection of their conversation. Further, what the exhibits also

¹⁰⁶Maciejewski dep, p 20, lines 12-19.

¹⁰⁷Maciejewski dep, p 20, lines 21-25; p 21, line 1.

¹⁰⁸Maciejewski dep, p 21, lines 7-16.

show is that Lanah Harris told Children's Hospital Poison Control--not Henry Maciejewski--that one pound of mercury was involved.¹⁰⁹

As to the Court of Appeals' statement that Mr. Maciejewski "directly contradicted the advice given the family by the Poison Control Center in telling them that it was mere speculation that the levels of mercury in the home were dangerous."¹¹⁰ Ms. Harris' actual testimony is:

Q. Did you tell [Mr. Maciejewski] when you talked to him that the Poison Control had told you to get out of the house?

A. Yeah. I said we waited in the yard. I thought somebody was going to show up here.

Q. What did he say to that?

A. He says well, you really can't be sure about anything until we get a meter in there. I mean he's just--he would be speculating.¹¹¹

The significance of this testimony is that, Ms. Harris told Mr. Maciejewski that Poison Control had told Ms. Harris to vacate the house, that Ms. Harris went back into the house, and that the next day Mr. Maciejewski said he "really can't be sure about anything until we get a meter in there." Nothing in his statement "directly contradicted the advice given the family by the Poison Control Center," as the Court of Appeals said.

¹⁰⁹Appendix D.

¹¹⁰Harris, supra at p 4 (Appendix A).

¹¹¹Harris dep, p 169, lines 20-24; p 170, lines 1-4.

Thus, two of the important “facts” on which the Court of Appeals based its opinion that Mr. Maciejewski was grossly negligent i.e., that he knew on July 2 that one pound of mercury was involved and that he directly contradicted the advice given by Poison Control, are not supported by any admissible evidence in the record below.

The issue of whether Mr. Maciejewski was grossly negligent turns on these two crucial questions: Did Mr. Maciejewski know one pound of mercury was involved in the spill? And when did he know it?

And both the trial court and Court of Appeals got the answers wrong: There is no--not one--piece of admissible evidence in this case to demonstrate that Mr. Maciejewski ever knew one pound of mercury was involved in the spill.

It can be inferred from the record below that Mr. Maciejewski knew or suspected on July 22, 1998, the date he tested the house, that a large quantity of mercury was spilled.

And what happens next shows the opposite of gross negligence: It demonstrate a high degree of diligence.

Mr. Maciejewski tested the house. He got readings that were within the acceptable industrial standards.¹¹² But he suspected the readings were wrong.¹¹³ He told the family to get rid of the mattress and couch, where the highest readings were

¹¹²Maciejewski dep, p 80, lines 22-25; p 81, line 1.

¹¹³Maciejewski dep, p 36, lines 14-17.

obtained.¹¹⁴

But he did not merely tell the family to move out of the house. He insured that they would have no choice in the matter: He called the City of Dearborn to red tag the house, he called the state health department, and he recommended that the EPA clean up the house. And he did all of this the day after he tested.¹¹⁵ And, indeed, what Mr. Maciejewski did worked. Ms. Harris confirmed that July 23--the day after Mr. Maciejewski tested--was the family's last day in the house.¹¹⁶

Was Mr. Maciejewski grossly negligent for being unable to immediately obtain a meter to test? Maybe, maybe not. The burden was on plaintiff to demonstrate the answer to this question with admissible evidence at the summary disposition stage.¹¹⁷

Was Mr. Maciejewski grossly negligent for not advising the family to move from the house? Maybe, maybe not. But the burden was plaintiff's to demonstrate at the summary disposition stage.¹¹⁸ Did Mr. Maciejewski's actions or inactions cause plaintiff's injuries? Maybe, maybe not. But the burden was plaintiff's to demonstrate with admissible evidence at the summary disposition stage.¹¹⁹

The record below demonstrates that plaintiff did not meet that burden. The trial

¹¹⁴Maciejewski dep, p 85, lines 23-24.

¹¹⁵Maciejewski dep, p 43, lines 6-16.

¹¹⁶Harris dep, p 166, lines 10-11.

¹¹⁷Maiden, supra at 127.

¹¹⁸Id.

¹¹⁹Skinner, supra.

court said "I don't know at this stage whether prolonged exposure causes more damage than first contact with mercury."¹²⁰

And "I don't know the answer to . . . causation without additional documentation . . ."¹²¹

The record is devoid of any evidence that if Mr. Maciejewski had told Ms. Harris to move out of the house, that she would have. Indeed, Ms. Harris' own testimony demonstrates that even after Poison Control told her to leave the house, she remained in the house for three weeks;¹²² i.e., until Mr. Maciejewski contacted Dearborn to have the house red-tagged.¹²³

The record also demonstrates that both Poison Control¹²⁴ and Mr. Maciejewski¹²⁵ told Ms. Harris on July 1 and July 2 to contact an environmental clean up company. But Ms. Harris never did.

The record also demonstrates that Poison Control told Ms. Harris to have the children's blood tested on July 1, but she did not do that until sometime between July 13-July 20.¹²⁶

¹²⁰Motion transcript, p 21, lines 9-11.

¹²¹Motion transcript, p 32, lines 23-25.

¹²²Appendix D. Harris dep, p 166, lines 10-11.

¹²³Harris dep, p 186, lines 8-10.

¹²⁴Appendix D.

¹²⁵Maciejewski dep, p 21, lines 10-16.

¹²⁶Appendix D.

Was Mr. Maciejewski's conduct between July 2 (the date Ms. Harris contacted Mr. Maciejewski for the first time) and July 23 (the date he informed city, state and federal agencies about the mercury spill) negligent in anyway?

The answer to that question is irrelevant because evidence of ordinary negligence does not create a material question of fact concerning gross negligence.¹²⁷

Almost 20 years ago, this court said "The very concept of immunity presupposes that the activities complained of may have been negligently performed."¹²⁸

Mr. Maciejewski submits that the admissible evidence in this case does not even demonstrate ordinary negligence. And the admissible evidence in this case certainly does not "put him in the class with the willful doer of wrong."¹²⁹

Nor was Mr. Maciejewski's "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."¹³⁰

Plaintiff did not meet her burden of proving gross negligence, therefore, Mr. Maciejewski is entitled to summary disposition as a matter of law.¹³¹

¹²⁷Maiden, *supra* at 122.

¹²⁸Cannon v Thumudo, 430 Mich 326; 422 NW2d 688 (1988).

¹²⁹Gibbard, *supra* at 321.

¹³⁰MCL 691.1407(2)(c).

¹³¹Maiden, *supra*.

III

MR. MACIEJEWSKI IS ENTITLED TO HAVE THE COURT OF APPEALS REVERSED IN THE INTEREST OF JUSTICE AND JUDICIAL ECONOMY

This case involves an employee of a political subdivision of the state. It involves the question of which party bears the burden of proof when a governmental employee asserts he is entitled to statutory immunity.

Although this court settled that issue in Maiden ("plaintiff failed to meet her burden . . ."),¹³² both the trial court and Court of Appeals said "defendant failed to meet his burden."

This mistake of law, combined with significant misstatements about the admissible facts contained in the record below, resulted in a clearly erroneous decision that conflicts with at least four decisions of this court.¹³³

And now, the Court of Appeals opinion is law of the case unless this court corrects those errors now or until this case returns to this court after trial.

These mistakes of law and fact are known now. And can be corrected by this

¹³²Maiden, supra at 127.

¹³³Robinson, supra. Skinner, supra. Maiden, supra. Haliw, supra.

court now.

In the interest of justice and judicial economy, Mr. Maciejewski requests this court reverse the lower courts.

CONCLUSION

As to causation, plaintiff presented nothing more than conjecture and mere speculation that Mr. Maciejewski caused plaintiff's injuries. As such, Mr. Maciejewski was--and is--entitled to summary disposition.¹³⁴

As to gross negligence, plaintiff failed to present evidence of even negligence. And as such, Mr. Maciejewski was--and is--entitled to summary disposition.¹³⁵

Based on the record below, Mr. Maciejewski asks this court, in lieu of granting leave to appeal, to grant him summary disposition.

RELIEF REQUESTED

WHEREFORE, Henry Maciejewski respectfully requests this Honorable Court:

1. In lieu of granting leave to appeal, reverse the lower courts and grant Mr. Maciejewski summary disposition (MCR 7.302(G)(1)); or, in the alternative,
2. Grant leave to appeal and grant Mr. Maciejewski summary disposition following full briefing; or, in the alternative,

¹³⁴Skinner, supra at 164.

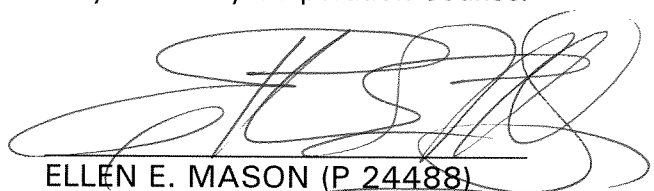
¹³⁵Maiden, supra.

3. Remand this case to the Court of Appeals for re-briefing and re-hearing and order that the Court of Appeals shall consider Maiden, Skinner, Robinson, and Haliw.

Respectfully submitted,

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